

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

74 1348

B
Pages

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1348

WARNER BROS. INC. and
COLUMBIA PICTURES INDUSTRIES, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

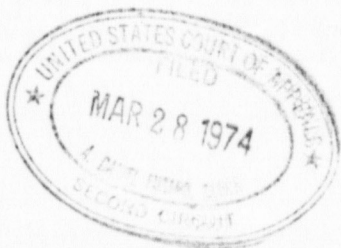
Respondents,

MCA INC.,

Intervenor.

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR



ARTHUR SCHEINER
ROBERT D. HADL
Wilner & Scheiner
2021 L Street, N. W.
Washington, D. C. 20036

3

TABLE OF CONTENTS

QUESTIONS PRESENTED	(ii)
STATEMENT OF THE CASE	(ii)
ARGUMENT	
THE PETITION FOR REVIEW SHOULD BE GRANTED IN ALL RESPECTS	2
PETITION FOR RECONSIDERATION BEFORE THE FEDERAL COMMUNI- CATIONS COMMISSION	Attachment A

QUESTIONS PRESENTED

MCA adopts the questions presented as stated in petitioners' brief.

STATEMENT OF THE CASE

MCA adopts the statement of the case as presented in petitioners' brief.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1348

WARNER BROS. INC. and
COLUMBIA PICTURES INDUSTRIES, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

MCA INC.,

Intervenor.

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR MCA INC.
IN SUPPORT OF THE PETITION FOR REVIEW

The petitioners in the above-captioned case are seeking review of a Report and Order issued by the Federal Communications Commission (FCC 74-80) on February 6, 1974, modifying Section 73.658(k) of the Commission's rules, the so-called "prime time access rule." MCA submits that the entire prime time access rule

should be set aside as requested by petitioners.

THE PETITION FOR REVIEW
SHOULD BE GRANTED IN ALL RESPECTS

MCA is a major independent producer of programs for television. These include series type programs such as "Ironside," "Marcus Welby, M. D." and "Adam 12" as well as made-for-television movies. MCA also licenses for television exhibition theatrical feature films which it owns (e.g., "Airport"). In addition to contracts which it makes with the three networks for exhibition of its programs, MCA is actively engaged in selling its programs in syndication. This means the station-by-station selling of television programs generally following the expiration of their availability to the networks.^{1/}

MCA has, in the past, also had substantial experience in the field of "first-run syndication" which is the licensing of programs directly to stations for exhibition without any prior network exposure.

^{1/} The re-selling of television programs, either series or movies, on a station-by-station basis, following a multi-year network contract, is recognized as a vital part of the economic life of independent producers. In re Network Programming (Access Rule), 23 FCC 2d 382, 388 (para. 10), 398 (Para. 29) (1970). It is the "off-network" showing of such programs that is the difference between a profit or loss for the producer -- network licenses rarely cover actual production costs -- and one of the reasons why the industry is characterized as a high risk business. Further, casualty rates for new programs are very great and the chances for a hit program such as "All in the Family" or "Sanford and Son" are no more than one in ten.

It is the possible viability of "first-run syndication" as a distribution technique which was at the crux of the Commission's decision in 1970 to adopt the prime time access rule.

As stated by the Commission, the principal purpose of the original rule was --

"... to make available an hour of top-rated evening time for competition among present and potential non-network program sources seeking the custom and favor of broadcasters and advertisers so that the public interest in diverse broadcast service may be served." (23 FCC 2d 382, 387).

Thus, the objective of the rule was "[a] healthy syndication industry composed of independent producers capable of producing prime time quality programs ..." (23 FCC 2d 382, 386).

The rule then adopted by the Commission was unprecedented in the respect that it was the Commission's first attempt to limit the right and obligation of television broadcast licensees to program their respective stations based upon a judgment of how their facilities might best serve the viewing public. The Commission felt impelled to take such an extreme step because of its long standing and deep-seated concern over network dominance of television broadcasting. At the same time the Commission forthrightly and candidly stated that if the rule did not meet its stated objectives it would promptly adopt such remedial measures as experience with the rule required. The

Commission stated:

"The rule can readily be changed or rescinded if it fails to achieve its purpose" 23 FCC 2d 382, 397.

MCA has been a vocal opponent of the rule since it was first adopted.^{2/} In the present proceeding, Docket No. 19622, it actively urged the Commission to repeal the rule. The thrust of MCA's position, both when the rule was first adopted and renewed in this proceeding is that the economics of the industry prevent the rule from meeting its stated objectives of limiting network control and dominance and producing new high quality programming through the distribution technique known as "first-run syndication." In the present proceeding, MCA, with other independent producers, showed that the three years of experience under the rule validated these convictions and demonstrated that the rule was a complete failure.^{3/} It also showed that the rule

2/ MCA was a petitioner before this Court in the consolidated cases known as Mt. Mansfield Television Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), which sustained the validity of the prime time rule.

3/ The rule was fully effective in 1971-72 with the exception of the off-network and feature film provisions, Section 73.658(k)(3) which were effective in September 1972. As MCA showed before the Commission, however, compliance with the off-network and feature film restrictions in the 1971-72 season occurred 77% of the time. Further, MCA submitted data in September, 1973, pursuant to the Commission's request at the oral argument held on July 30-31, 1973, to show the television schedules for network-affiliated stations in the top 50 markets for the forthcoming and current 1973-74 television seasons. Thus, when the Commission announced its basic decision on November 29, 1973, it had in the record detailed data showing experience under the rule for the three television seasons of 1971-72, 1972-73 and 1973-74.

had resulted in detrimental and harmful effects contrary to the public interest.

Based on the voluminous pleadings and statistics before it, as well as two days of oral argument, a majority of the Commission, however, decided to retain the rule, but in slightly modified form. The concurring statements of Chairman Burch and Commissioners Reid and Wiley accompanying the Report and Order under review indicate that the changes in the rule represent a compromise of conflicting views, but are generally directed toward a relaxation of the existing restraints. In one respect, however, -- the new feature film restriction -- the restraints imposed by the rule are expanded. Where the present rule permits the showing of features during access time provided only that the same feature has not been shown in the market for two years, the new rule imposes a total ban on features in the newly defined access period. And the practical effect of the new rule is to impose a total "blackout" of features on the affected stations between the hours of 6:00 - 11:00 p.m.

In the belief that the revised feature film rule is so blatantly at odds with the Commission's objectives underlying the rule and that it disserves the public interest, MCA, on March 18, 1974, filed a petition for reconsideration with the Commission urging a change in that aspect of the new access rule. (A copy of the MCA petition is

attached hereto as Attachment A).^{4/} The MCA petition also reserved MCA's position on the merits of the rule changes for the purpose of court review of any final Commission action.^{5/}

Accordingly, under the present circumstances, and with jurisdiction of the entire matter now resting with this Court, MCA fully supports the views expressed by petitioners. In particular, MCA believes that no justification can be found for the new feature film restriction, Section 73.658(k)(1). Thus, for the reasons set forth in its petition for reconsideration before the Commission (attached hereto) as well as in petitioners' briefs, MCA submits that the prime time access rule, including the feature film restriction, should be set aside.

4/ In total, four petitions for reconsideration were filed with the Commission. Three of the petitions were directed to the feature film restriction. (One of these petitions, filed on behalf of Screen Gems was subsequently withdrawn because of the appeal by Columbia Pictures in this case.) The fourth, was filed on behalf of a game show producer who did not participate in the proceedings prior to the adoption of the Report and Order, see 47 U. S. C. 405. It urged that the original rule be retained with the added condition that multiple exposures of different episodes of the same program be prohibited during a given week.

5/ The petitions for reconsideration are currently pending before the Commission. By public notice dated March 20, 1974, the Commission gave parties until April 1, 1974, to file oppositions to the petitions and until April 8, 1974, to file replies to oppositions.

- 7 -

Respectfully submitted,
MCA INC.

By: Arthur Scheiner
Robert D. Hadl
Its Attorneys

WILNER & SCHEINER
2021 L Street, N.W.
Washington, D. C. 20036

March 28, 1974.

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of)	Docket No. 19622
)	
Consideration of the operation)	RM-1967
of, and possible changes in)	RM-1935
the "prime time access rule,")	RM-1940
Section 73.658(k) of the)	RM-1929
Commission's Rules)	

To: The Commission

PETITION FOR RECONSIDERATION

MCA Inc., pursuant to Section 405 of the Communications Act and Section 1.106 of the Commission's rules, hereby petitions for reconsideration of the Report and Order (FCC 74-80) adopted by the Commission in the above-captioned proceeding.

In particular MCA urges the Commission to reconsider that part of its decision which bars absolutely the showing of feature films during the period 7:30 - 8:00 p.m. Monday - Saturday on network affiliated stations in the top 50 markets.

Statement of Position

MCA Inc. has participated actively in the present proceeding designed to evaluate and make revisions in the "prime time access rule." It has filed comments, reply comments and, in association

with other independent producers, presented expert testimony and argument before the Commission. The thrust of MCA's position, both when the rule was first adopted and renewed in this proceeding, is that the prime time access rule is doomed to failure. MCA remains firmly convinced that the economics of the industry prevent the rule from meeting its stated objectives, and that the three years of experience under the rule validate this conviction and demonstrate that the rule has not affected network dominance but rather has resulted in detrimental and harmful effects contrary to the public interest. For these reasons, MCA submits that the Commission should repeal the rule.

MCA recognizes, however, that its views on the merits of the access rule have not persuaded a majority of the Commission to repeal the rule at this time. Rather, a majority believes that the rule should be retained, but in modified form. The concurring statements of Chairman Burch and Commissioners Reid and Wiley accompanying the Report and Order indicate that the changes in the rule represent a compromise of conflicting views, but are directed toward a relaxation of the existing restraints.

In light of the long history of this proceeding and the decision reached, MCA believes that it would be pointless to revisit all the arguments it has previously made to the Commission urging repeal of the rule. While MCA reserves the right to make such arguments

to the courts in a case seeking review of any final action by the Commission, it will limit this petition to one issue -- the new feature film rule. MCA submits that the revised feature film rule does not contribute to a relaxation of existing restraints but constitutes a virtual "blackout" on feature films during prime time hours. Accordingly, MCA is including herein a proposal to resolve what it believes is an unreasonable and impermissible restraint on producers and station licensees.

Feature Film Proposal

The new access rule adopted by the Commission imposes a flat prohibition on the showing of feature films on network affiliated stations in the top fifty markets during the period 7:30 - 8:00 p.m. Monday - Saturday. This new restraint is more restrictive than the existing feature film rule which permits the showing of features during access time provided only that the same feature has not been shown in the market for two years. The effect of the new total restraint on films during the 7:30 - 8:00 p.m. period is contrary to the public interest because it will reduce the availability of high quality films for viewing by the public on network affiliated stations to a far greater extent than the limited 7:30 - 8:00 p.m. period proscribed by the rule. Indeed, it will, as a practical matter, result in the total drying-up of the syndicated

market for films on the affected stations during the entire 6:00 - 11:00 p.m. period, and severely and adversely affect the quality and freshness of movies available to local stations for non prime time viewing such as the very popular 4:30 - 6:00 p.m. and Saturday and Sunday 11:30 p.m. periods. These results will disadvantage the viewer. They will place a premium on the network showing of first-run feature films, cause a stockpiling of subsequent runs by the networks, and subvert the Commission's objective of reducing network dominance. Further, the independent production industry will suffer immeasurably and there will be a further weakening of the base for new filmmaking.

In consideration of these adverse and detrimental effects of the new rule, MCA urges the Commission to reconsider its decision and to permit the showing of feature films at the discretion of the local affiliated stations one night per week (Monday - Saturday) during the 7:30 - 8:00 p.m. period. Such a determination would give to these stations a right to select their programming and to exercise their responsibility as licensees in the public interest. No obligation would be imposed. As a result the public would have an opportunity to view high quality films which might not have been seen during the network run and which would otherwise be unavailable in syndication during prime time hours. It would reduce rather than strengthen the possibility of network dominance. Further, it would restore to the production industry a vital and important source of revenue.^{1/}

^{1/} The text of the MCA proposal is attached as Appendix A.

ARGUMENT

The New Feature Film Restriction Effectively
Imposes a "Blackout" on Feature Films Between
The Hours 6:00 - 11:00 p. m.

In its Report and Order adopting changes in the prime time access rule, the Commission determined to restrain the showing of feature films between the hours of 7:30 - 8:00 p. m. (E. T.) (Monday - Saturday) on network affiliated stations in the top 50 markets.^{2/} It recognized, however, that there was merit to the argument that "the present rule unduly restricts licensees in the selection of movies they believe desirable (whatever their origin or last telecast) and that stations should be able to present a movie fairly often during prime time in order to recover its high cost, if their judgment so indicates," Report and Order, para. 86. Nevertheless, it determined that the 7:30 - 8:00 p. m. proscription was the best approach since it removed the present restriction on the 7:00 - 7:30 period and enabled stations "to present a 90 minute movie on Saturday from 6:00 to 7:30 p. m. or indeed any other day of the week," Ibid. Further, it noted that stations could "preempt network time later, as a number do and long have done, if they wish to present their own movies, in addition to the 7:00 p. m. period mentioned," Report and Order, para. 87.

^{2/} While the half-hour constituting the new access period varies with the different time zones, our argument on the effects of the restriction applies equally to each zone.

The Commission's view of the limited effects of its feature film proscription does not square with the realities of the television program marketplace. Indeed, the alternatives it proposes for the showing of feature films between the hours of 6:00 - 11:00 p.m. are wholly infeasible and, in part, directly opposed to Commission objectives.

Starting with the suggestion that films may be shown between the hours of 6:00 - 7:30 p.m., it is abundantly evident that this would require the network affiliated stations to preempt both local and national news (Monday - Friday). We cannot believe that the Commission treats seriously, therefore, its suggestion that this period is or should be available for the showing of feature films.

Nor is the 6:00 - 7:30 p.m. period really available on weekends. As pointed out in the Comments of Peninsula Broadcasting Co., pp. 23-25, this period has been increasingly utilized to program extended sports events and specials. Further, under the new rule, one of the networks, NBC, has already stated its intention to program a news-type documentary from 7:00 - 8:00 p.m. on Saturdays and to begin the network schedule with "Wonderful World of Disney" at 7:00 p.m. on Sunday. It can be assumed that ABC and CBS will announce comparable programming measures as the new season approaches. Thus, the 6:00 - 7:30 p.m. period is just not available for the showing of feature

films as suggested by the Commission.

Turning to the period after 8:00 p.m., we find no greater possibility for the showing of feature films by local affiliated stations.^{3/} Here the showing of such films can only occur if a local station preempts network time. Since the adoption of the access rule, however, and the effective limitation on network schedules to three hours per night, the practical possibility for stations preempting the network to show a feature film has been reduced to a meaningless level. Thus, statistics compiled by MCA show that whereas local affiliated stations in the top 50 markets were preempting the networks on a monthly basis of 117 times in 1969 to show features during prime time (7:30 - 11:00 p.m.), the number of monthly preemptions has been reduced to a total of 33 in November, 1973 (8:00 - 11:00 p.m.) (see Appendix B).

The reason why stations no longer preempt the network between the hours of 8:00 - 11:00 p.m. are self-evident. First the network schedule under the rule is reduced to three hours and a preemption for a 90 minute or two hour movie drastically curtails the network feed on the particular night the preemption takes place. Second, whereas prior to the rule stations had an abundance of local and profitable advertising minutes to sell, the access rule has drained those minutes from possible

^{3/} Of course since films are at least 90 minutes in length, the periods 6:30 - 8:00 p.m., 7:00 - 8:30 p.m., and 7:30 - 9:00 p.m. are all barred by the complete blackout on features during 7:30 - 8:00 p.m.

preemptions to the access shows. Thus, where a local station might have been able to offer 18 prime time minutes to local advertisers for a prime time movie prior to the adoption of the rule, it now finds that the access programming consumes 42 minutes of local advertising time (7 half hours per week times 6 minutes per half hour). This availability of prime time minutes absorbs most of the demand by local advertisers for prime time spots and is the principal reason for the drastic reduction in feature film preemptions by local stations noted above. Accordingly, it is unrealistic to assume that meaningful preemptions of network time will occur between the hours of 8:00 - 11:00 p.m.

MCA submits, therefore, that the Commission has been completely misguided in its assumption that the restriction on feature films between the hours of 7:30 - 8:00 p.m. will nevertheless permit local stations to show films at other times during the evening hours of between 6:00 - 11:00 p.m. In effect, as a practical matter, the Commission limitation constitutes an absolute "blackout" on the showing of feature films by network affiliated stations in the top 50 markets during these time periods.

The Viewing Public Will Be Harmed By The
Feature Film Blackout

The practical effect of the feature film "blackout," as described above, is to eliminate the entire prime time period for syndication of

feature films on network affiliated stations. The viewing public will be directly and adversely affected as a result.

The only viewing audience which can see a film is the one which happens to be available at a particular hour of a particular day on which the presentation is made. On the average, for a network program, this audience generally represents approximately 60% of the total viewing audience. In fact, a popular program will reach only one-third of this audience, or in the order of 20% of the total potential audience. There is, therefore, a built-in audience consisting of 80% of potential viewers for subsequent television performances of the more popular programs. And even assuming that the second run of a program will receive a comparable share of the listening audience, it is apparent that more than 60% of the total potential viewing audience will not have seen either showing of the program. In the case of feature films, this means that absent further network showings, the only opportunity for 60% of the viewing public to see the film will be on a local station in syndication.

The Commission's feature film "blackout," however, virtually assures that the film will not receive a subsequent showing by a local network affiliated station between the hours of 6:00 - 11:00 p.m. ^{4/}

^{4/} While feature films could be shown during these hours in some of the larger communities of the country on independent stations, such stations are not only few in number but non-existent in a substantial number of the top 50 markets.

This means that the average working person who is not home until the evening hours will be effectively deprived of an opportunity to see the film save for a possible showing on a Saturday or Sunday afternoon. This is hardly an acceptable choice or substitute.

The continued popularity and acclaim which feature films receive on television is well known to the Commission. Only recently, a made-for-television feature starring Cicely Tyson and entitled, "The Autobiography of Miss Jane Pittman," received rave reviews from the critics. While it garnered an extremely high rating, 70% of the total potential television audience did not see the film. If MCA were the owner of the film, it would normally license only one more run by the network, and, thereafter, make it available for syndication.^{5/}

Under the Commission's new rule, however, syndication of films during the prime time hours is no longer a realistic possibility. The viewing public that does not see the film on its first two telecasts will not, as a practical matter, have another opportunity to see the film between the hours of 6:00 - 11:00 p.m. in syndication on local affiliated stations. Thus, the resulting "blackout" will clearly deprive the public of an opportunity to view widely acclaimed films.

^{5/} It was the firm and advertised policy of MCA, prior to the adoption of the prime time rule, to place all its feature films into syndication quickly. Network license agreements were limited in duration and to a maximum of two runs.

The Feature Film "Blackout" Subverts The
Commission Objectives Underlying the Access Rule

In its Report and Order issued in May, 1970, 23 FCC 2d 382, the Commission set forth the bases and rationale upon which it relied for the adoption of the prime time access rule. As stated by the Commission (23 FCC 2d at 394):

The public interest requires limitation on network control and an increase in the opportunities for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated needed sources of mass appeal programs competitive with network offerings in prime time.

The rule then adopted by the Commission was unprecedented in the respect that it was the Commission's first attempt to limit the right and obligation of television broadcast licensees to program their respective stations based upon a judgment of how their facilities might best serve the viewing public. The Commission felt impelled to take such an extreme step because of its long standing and deep-seated concern over network dominance of television broadcasting. It hoped that the rule would "open the market to first run syndicated programs" (23 FCC 2d at 395) and encourage a "diversity of program ideas," (Ibid). Further, by fostering the development of diverse and antagonistic sources of programs, the rule would assist the broadcast licensee in the discharge of his duty as "trustee" for the public in the operation of his station (23 FCC 2d at 400).

None of these objectives has been changed or revised by the Report and Order in the present proceeding. To the contrary they have been reaffirmed and the rule retained in a slightly abbreviated form. Against this backdrop MCA submits that the feature film "blackout" not only strains the outer limits of rationale justification, but is counterproductive and subverts the basic purposes of the rule.

By removing the ability of local network affiliated stations in the top 50 markets to show feature films during the hours 6:00 - 11:00 p.m., the Commission has placed a premium on network showings of feature films. Without a viable prime time syndication market for features, producers will inevitably look to additional network showings or other media as more lucrative alternatives for the sale of their product. But longer network contracts with additional network runs are clearly contrary to the Commission's basic objective of reducing network dominance.^{6/}

Indeed, in another proceeding currently pending before the Commission, Docket No. 19554, relating to rules for cable television when a per program or per channel charge is made, the Commission has indicated great concern as to the potential for "siphoning" that may occur from conventional television to pay-cable. While the production industry has assured the Commission that "siphoning" will not occur and that films will continue to be shown on conventional

^{6/} As indicated above, n. 5, it was the firm and advertised policy of MCA prior to the adoption of the prime time rule to limit network license agreements to two runs. The "blackout" now imposed by the Commission clearly undercuts that policy.

television, the Commission, by its own action in this proceeding, may be guilty of "siphoning" by destroying the syndicated market for films in favor of the network market. The practical effect of the Commission's action is to restructure the marketplace so as to remove the incentive for the seller to sell and the buyer to buy. In these circumstances, the seller may validly look for new and alternate markets for his wares.

Further, the feature film "blackout" reduces diversity and as the Commission concedes "cut(s) down licensee flexibility compared to what it is now," Report and Order, para. 80. It is no answer, as the Commission suggests, to afford compensatory flexibility elsewhere because the time period suggested by the Commission -- 6:00 - 7:30 p.m. -- is, as demonstrated above, unrealistic and impractical. In effect by banning feature films totally from the prime time market the Commission has reduced diversity and subverted the objective of licensee discretion and flexibility. No countervailing rationale is offered to present a reasonable justification for this new restraint.

A Viable Syndication Market is Essential For A
Healthy Production Industry

The Commission has continually stressed and recognized that a healthy production industry is essential in the public interest. In its Report and Order adopting the prime time rule, the Commission

stated (23 FCC 2d at 386):

A healthy syndication industry composed of independent producers capable of producing prime time quality programs must have an adequate base of television stations to use its product.

More recently, in its Cable Television Report and Order, 36 FCC 2d 141, 169-170, the Commission stressed the need to "insure the continued supply of television programming" and emphasized that a healthy program production industry is "fundamental to the continued functioning of broadcast and cable television alike."

The importance of the syndication market for feature films and to the health of the producers is demonstrated by the impact of even the less restrictive rule presently in effect limiting the use of feature films during access time. The latest industry figures assembled by the Motion Picture Association of America show that syndicated gross sales to television of theatrical features and shorts produced by independent program producers dropped sharply from \$49 million in 1972 to \$43 million in 1973, or a reduction of 12%.^{7/}

The results are unmistakable. The prime time access rule

^{7/} While no breakdown exists between features and shorts, it is generally agreed that features represent approximately 95% of the above combined figures. Also, no breakdown exists for the top 50 markets alone, but it is estimated that syndicated sales to stations in these markets represent more than 70% of total syndication sales.

is destroying the syndicated market for feature films. By limiting the syndication of feature films to afternoon and late evening hours, stations are no longer able to pay a price which reflects an amortization for feature films shown during prime time hours. The new feature film "blackout" insures that this trend will continue.^{8/}

The impact of this action on MCA and other motion picture producers will be substantial and severe. It is a matter of record that syndication of feature films, like syndication of series programs, is an important element of the total revenue derived from the sale of such films. It is also a matter of record that two of the seven major production companies are in financial difficulty. Columbia Pictures Industries, Inc. has suffered a total loss of some 82 million dollars in recent years and a loss of some 50 million dollars in 1973 alone. Metro-Goldwyn-Mayer Inc. has determined on a severely reduced schedule of new theatrical features.

The Commission has repeatedly recognized that the huge structure of the conventional television industry is dependent upon the financial viability of the motion picture industry. That industry supplies the basic program fare which serves the American public. The harsh and insecure financial condition of the industry should not be worsened. The public interest requires that restrictions such as the feature film "blackout" be lifted so as to encourage rather than stifle new opportunities for growth.

^{8/} A further and substantial adverse effect is that the quality and freshness of feature films appearing in the very popular 4:30 - 6:00 p.m. period and 11:30 p.m. period Saturday and Sunday will be reduced. Absent a prime time amortization overall syndication sales will undoubtedly suffer.

The Feature Film "Blackout" Involves Regulatory
Interference With Program Content Contrary To
The Communications Act and the First Amendment

In considering the reasonableness of the feature film "blackout" imposed by the Commission, MCA submits that due consideration must be given to the delicate program content questions posed by the restriction. MCA contends that they constitute an unwarranted intrusion by the Commission into areas specifically prohibited by the Communications Act and the First Amendment.

No discussion of the First Amendment considerations raised by the new feature film "blackout" can proceed without a recognition of the decision in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), where the existing prime time rule was sustained against a constitutional challenge. The court rejected arguments that the rule abridged First Amendment freedoms on the ground that the rule was designed to protect rather than subvert the First Amendment freedoms of the viewing public. It was the interest of the viewing public that the Court found paramount under the teachings of Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969); Associated Press v. United States, 326 U.S. 1 (1945); and National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943). Thus, the feature film "blackout" can be sustained only if its abridgement of the individual rights of producers and station licensees

enhances the right of the public to receive access to the marketplace of diverse views. See also Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied 396 U.S. 842; Brandywine Main Line Radio Inc. v. F.C.C., 473 F.2d 16 (D.C. Cir. 1972)(Bazelon, C. J. dissenting).

Viewed in this light MCA submits that the feature film "blackout" now imposed by the Commission must fall. As discussed above, the new regulation is not a reasonable device to thwart network monopoly and control and thereby encourage a diversity of opinion. To the contrary its principal effect is to silence a diversity of opinion and to subvert the desired objective of reducing network monopoly power.

Further, the new restriction goes far beyond the limited administrative regulation upheld in Mt. Mansfield. A direct and absolute restraint is now imposed on a particular kind of program content, feature films. But no reasonable basis for the absolute proscription is offered and none can be found.

Under these circumstances, MCA submits that the Commission's balancing of individual and public rights has not resulted in a clear determination that the scale must be tilted against individual freedom to achieve a valid public purpose. In this delicate area of First Amendment protection, the feature film "blackout" goes too far.

Permitting Stations to Show Feature Films One
Night Per Week During the Hours 7:30 - 8:00 p. m.
Would Serve the Public Interest

MCA urges the Commission to modify its feature film rule on reconsideration to permit network affiliated stations in the top 50 markets to show feature films one night per week (Monday - Saturday) during the hours 7:30 - 8:00 p. m. Such an exception to the feature film "blackout" produced by the new rule would clearly serve the public interest.

As indicated above, the new rule limits licensee flexibility and responsibility. The proposed exception to the rule would restore this flexibility and responsibility by giving stations a right to select their own programming and to determine whether they are meeting the needs and interests of the viewing public in their communities. It should be emphasized that the proposed exception would not create any obligation upon any station. It would merely give each network affiliated station in the top 50 markets the discretionary right to show a feature film during the period 7:30 - 8:00 p. m.

Further, the discretionary right to show films on a once a ~~week~~ week basis would encourage network preemptions since any film started at 7:30 p. m. would overlap with the network schedule. It would also restore the ability of local stations to include a prime time amortization as part of its feature inventory and thereby increase the

ability of local stations to compete for the purchase of such product. In all these respects, network control and power would be reduced.

The viewing public would similarly benefit from such an exception by having an opportunity to see films on local stations which were not seen on their initial network showings. Without the exception, it is doubtful whether any meaningful showing of films during prime time hours will take place on local stations in the top 50 markets.

In its Report and Order, para. 86, the Commission stated that its decision to impose a total ban on feature films was made, in part, to avoid the difficult and complex problems of distinguishing certain types of films, whether they were previously shown on the network and whether they were previously played in a particular market. The proposal advanced herein minimizes these problems.

First, by eliminating any time delay during which films are proscribed, as under the present rule, the proposal avoids the difficult administrative problem of determining whether films were previously shown in the market. Second, consistent with the objective of encouraging stations to purchase films in syndication for prime time viewing, the proposal would apply equally to films previously shown on the network. If a distinction were created between films previously shown on the network and those never shown on the network, the former category of

films would be subjected to the very kind of network control which this proceeding is designed to eliminate. Third, the proposal would create no distinction between "theatrical" features and "made-for-television" features. Such a distinction would unfairly discriminate against one type of film over another and would fail to recognize the substantial and increasing popularity of made-for-television features.^{9/}

In sum, the MCA proposal does not impose on the Commission the problem of creating distinctions which the Commission regards as "artificial at best." It avoids these problems, is consistent with the basic objectives underlying the access rule, and serves the public interest.

CONCLUSION

For the foregoing reasons, MCA respectfully urges the Commission to adopt its proposal, submitted herewith, to permit the showing of feature films at the discretion of local stations one night per week (Monday - Saturday) during the 7:30 - 8:00 p.m. period.

^{9/} For a discussion of the reasons why "made-for-television" features should not be treated differently from "theatrical" features, see Comments of MCA, pp. 52-56.

Respectfully submitted,

MCA INC.

By S/ Arthur Scheiner
Arthur Scheiner

S/ Robert D. Hadl
Robert D. Hadl
Its Attorneys

WILNER & SCHEINER
2021 L Street, N. W.
Washington, D. C. 20036

March 18, 1974

APPENDIX A

Amend Section 73.658 of the Commission's rules as proposed in Report and Order (FCC 74-80) by amending subsection (k)(1) to add:

"(iii) one (1) of these six (6) half-hours each week may also consist of feature films.

"(iv) 'feature film' means any program (a) first shown in a theatre or theatres, or (b) if first shown on television is a dramatic program, of at least 90 minutes in length (including commercial advertising) where the plot and the principal cost of characters are not interconnected or substantially related to any other program first shown on television on a regular basis."

APPENDIX B

LOCALLY ORIGINATED PRIME TIME FEATURES ON
NETWORK AFFILIATES IN TOP 50 MARKETS

	<u>11/67</u>	<u>3/68</u>	<u>11/68</u>	<u>3/69</u>	<u>11/73</u>
New York	-	-	-	-	-
Los Angeles	-	-	-	-	-
Chicago	-	-	-	-	-
Philadelphia	-	1	1	1	1
Boston	2	3	3	4	-
San Francisco	-	-	-	-	-
Detroit	-	-	-	-	-
Cleveland	2	2	1	-	-
Washington, D.C.	-	-	-	1	-
Pittsburgh	2	2	2	2	1
(Totals)	(6)	(8)	(7)	(8)	(2)
St. Louis	1	1	-	1	-
Dallas-Ft. Worth	-	-	-	-	-
Minneapolis-St. Paul	1	1	1	1	-
Houston	1	2	2	2	-
Baltimore	1	1	1	2	1
Atlanta	3	3	3	3	1
Seattle-Tacoma	1	1	2	3	2
Indianapolis	1	1	1	1	1
Miami	3	3	3	3	1
Cincinnati	3	3	5	4	1
(Totals)	(15)	(16)	(18)	(20)	(7)
Hartford-New Haven	3	3	3	3	1
Buffalo	4	5	5	5	2
Milwaukee	2	1	1	1	1
Kansas City	3	2	4	4	1
Sacramento	4	5	4	4	1
Tampa-St. Pete	4	4	5	5	2
Portland, Ore.	-	-	-	-	1
Memphis	3	3	2	2	-
Providence	3	3	3	3	1
Nashville	3	3	3	3	1
(Totals)	(29)	(29)	(30)	(30)	(11)

	<u>11/67</u>	<u>3/68</u>	<u>11/68</u>	<u>3/69</u>	<u>11/73</u>
Columbus, Ohio	4	3	4	4	-
Denver	4	4	4	4	1
Birmingham	3	-	3	3	N.A.
Charleston-Huntington	4	4	4	3	1
New Orleans	5	5	5	4	1
Grand Rapids-Kalamazoo	3	3	3	3	-
Albany-Schenectady	3	4	2	3	-
San Diego	4	4	2	2	1
Louisville	3	3	3	4	-
Charlotte	3	4	4	4	1
(Totals)	(36)	(34)	(34)	(34)	(5)
Greenville-Spartanburg	2	2	4	3	1
Oklahoma City	2	4	4	4	2
Dayton	3	3	2	3	1
Syracuse	2	2	3	3	-
Phoenix	1	1	1	1	-
Norfolk	2	3	2	2	-
Harrisburg-Lancaster	-	-	1	1	1
San Antonio	3	3	4	3	2
Greensboro-Winston Salem	3	3	2	2	-
Wichita-Hutchinson	2	2	3	3	1
(Totals)	(20)	(23)	(26)	(25)	(8)
Total Top 50 Markets January 18, 1974	106	110	115	117	33

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1348

WARNER BROS. INC. and
COLUMBIA PICTURES INDUSTRIES, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

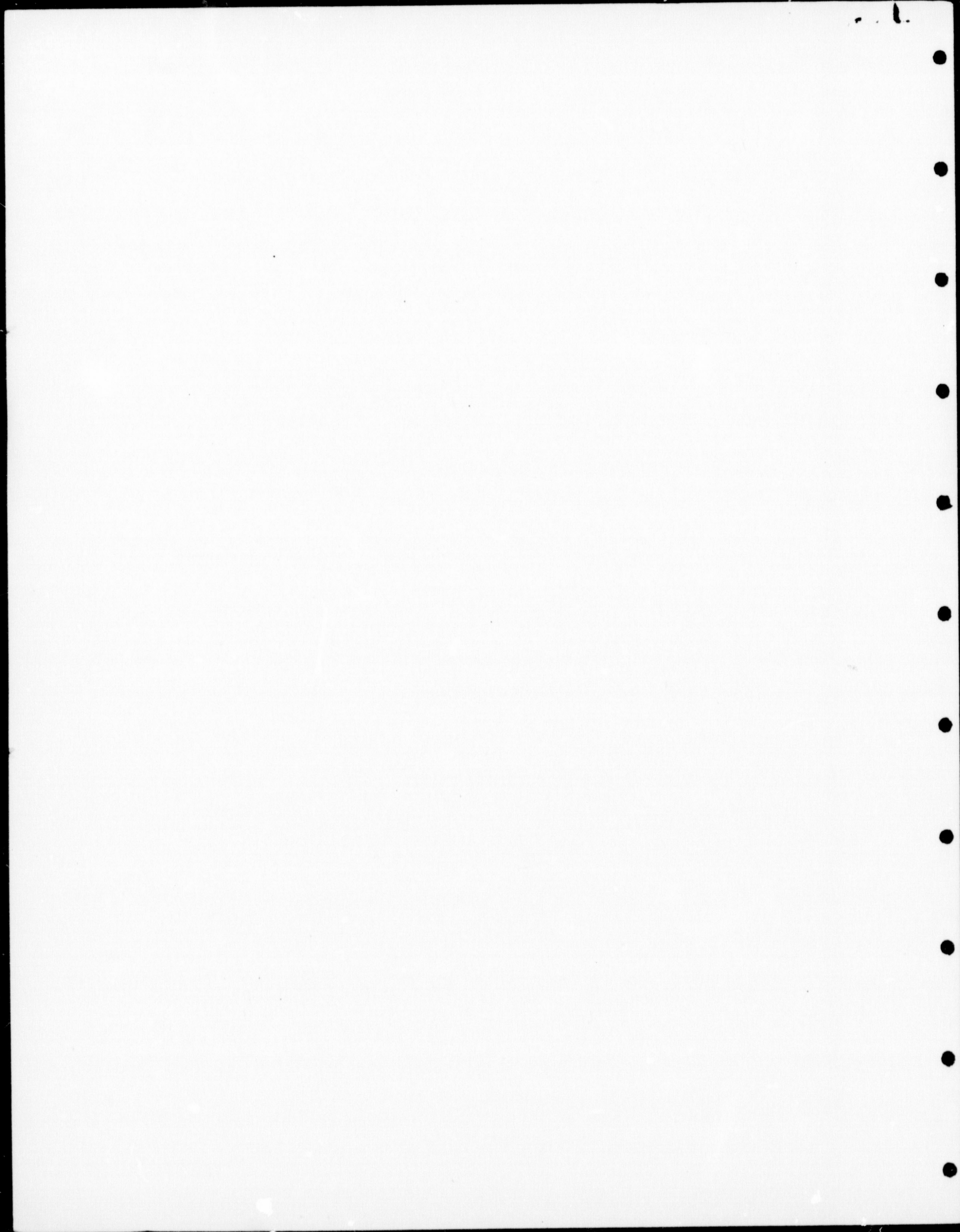
MCA INC.,

Intervenor.

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR

ARTHUR SCHEINER
ROBERT D. HADL
Wilner & Scheiner
2021 L Street, N. W.
Washington, D. C. 20036



CERTIFICATE OF SERVICE

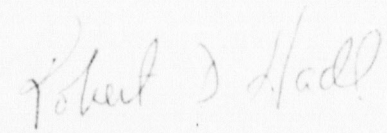
It is hereby certified this 28th day of March, 1974,
that copies of the "Brief for Intervenor" have been mailed,
first class postage prepaid, to the following:

Stuart Robinowitz, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022
Counsel for Warner Bros. Inc. and
Columbia Pictures Industries, Inc.

Katrina Renouf
Renouf, McKenna & Polivy
1532 - 16th Street, N. W.
Washington, D. C. 20036
Counsel for National Association of Independent
Television Producers and Distributors

Daniel R. Ohlbaum, Esquire
Acting General Counsel
Federal Communications Commission
Washington, D. C. 20554

The Honorable William B. Saxbe
Attorney General of the United States
United States Department of Justice
Washington, D. C. 20530



S/ Robert D. Hadl
Robert D. Hadl